14 (8) No. 08-448

Supreme Court, U.S.
FILED
NOV 5 - 2008
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

CABLE NEWS NETWORK, INC., *et al.*,

Petitioners,

v.

CSC HOLDINGS, INC. and
CABLEVISION SYSTEMS CORP.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR *AMICI CURIAE* BROADCAST MUSIC, INC. AND AMERICAN SOCIETY OF COMPOSERS, AUTHORS & PUBLISHERS IN SUPPORT OF PETITIONERS

STEVEN J. METALITZ
ERIC J. SCHWARTZ
J. MATTHEW WILLIAMS
MITCHELL SILBERBERG & KNUPP LLP
1818 N Street, N.W., 8th Floor
Washington, D.C. 20036
(202) 355-7900

JOAN M. MCGIVERN
RICHARD H. REIMER
SAMUEL MOSENKIS
CHRISTINE A. PEPE
ASCAP Building
One Lincoln Plaza
New York, NY 10023
(212) 621-6200

Counsel for Amicus Curiae American Society of Composers, Authors & Publishers

MICHAEL E. SALZMAN
Counsel of Record
JESSICA A. FELDMAN
HUGHES HUBBARD & REED LLP
One Battery Park Plaza
New York, NY 10004
(212) 837-6000

MARVIN L. BERENSON
JOSEPH J. DIMONA
320 West 57th Street
New York, NY 10019
(212) 586-2000

Counsel for Amicus Curiae Broadcast Music, Inc.

TABLE OF CONTENTS

	Page
TABLE OF CITED AUTHORITIES	iii
INTEREST OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	4
ARGUMENT	6
I. ALLOWING THE SECOND CIRCUIT DECISION TO STAND WILL CAUSE IMMEDIATE AND SUBSTANTIAL HARM TO SONGWRITERS AND COMPOSERS	6
A. The Second Circuit Decision Creates a Loophole That Allows Music Users to Avoid Paying Public Performance License Royalties	6
B. The Second Circuit Decision Threatens to Deprive Songwriters of Royalties for a Broad Range of Digital and On-Demand Services	9
C. Because of the Rate Court System Which Governs ASCAP and BMI, Music Creators May Be Particularly Harmed by the Decision Below	11

Contents

Page

II. THE SECOND CIRCUIT DECISION IS CLEARLY INCONSISTENT WITH THE BROAD EXCLUSIVE RIGHT OF PUBLIC PERFORMANCE DESCRIBED IN THE TEXT AND THE LEGISLATIVE HISTORY OF THE COPYRIGHT ACT 13

A. The Second Circuit Misinterpreted the Statute 14

B. The Second Circuit Disclaimer Provides No Comfort to Composers of Music and Interferes with Congress' Intent to Make Exclusive Rights Divisible 19

C. The Second Circuit Decision is Inconsistent with International Copyright Treaties to Which the United States is a Member 21

CONCLUSION 25

TABLE OF CITED AUTHORITIES

Page

Cases

Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1 (1979) 3

Buck v. Jewell-La Salle Realty Co., 283 U.S. 191 (1931) 16

Cartoon Network LP, LLLP v. CSC Holdings, Inc., 536 F.3d 121 (2d Cir. 2008) ..... *passim*

Columbia Pictures Industries, Inc. v. Redd Horne, Inc., 749 F.2d 154 (3d Cir. 1985) 17

Eldred v. Ashcroft, 537 U.S. 186 (2003) 23

Jerome H. Remick & Co. v. Gen. Elec. Co., 16 F.2d 829 (S.D.N.Y. 1926) 18

Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913 (2005) 20

On Command Video Corp. v. Columbia Pictures Indus., 777 F. Supp. 787 (N.D. Cal. 1991) 17

United States v. American Society of Composers, Authors & Publishers, 2001-2 Trade Cases (CCH) ¶ 73,474 (S.D.N.Y. 2001) 2

Cited Authorities

	Page
United States v. Am. Soc'y of Composers, Authors & Publishers (In re America Online Inc., RealNetworks Inc. & Yahoo! Inc.), 562 F. Supp. 2d 413 (S.D.N.Y. 2008)	12
United States v. Broad. Music, Inc., 1966 Trade Cases (CCH) ¶ 71,941 (S.D.N.Y. 1966), *amended by* 1996-1 Trade Cases (CCH) ¶ 71,378 (S.D.N.Y. 1994)	2
Statutes and Rules	
17 U.S.C. § 101	*passim*
17 U.S.C. § 106	*passim*
17 U.S.C. § 114	16
17 U.S.C. § 201(d)(2)	20
Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988)	23
Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998)	23
Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994)	23

Cited Authorities

Page

Legislative and Administrative Materials

H.R. REP. No. 90-83 (1967) 15

H.R. REP. No. 94-1476 (1976) 14, 19, 20

S. REP. No. 94-473 (1975) 14, 19, 20

Treaties

Agreement on Trade-Related Aspects of Intellectual Property Rights, April 15, 1994, 33 I.L.M. 81 ..... 22, 23

Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, (Paris Text 1971, as amended Sept. 28, 1979), 828 U.N.T.S. 221 ..... 21, 22, 23

WIPO Copyright Treaty, Dec. 20, 1996, 36 I.L.M. 65 ..... 22, 23

Treatises and Periodical Materials

Claude Masouye, *Guide to the Berne Convention for the Protection of Literary and Artistic Works* par. 11.4 (WIPO Publication 1978) ... 22

William F. Patry, 4 PATRY ON COPYRIGHT § 14:16 (2008) 15

Cited Authorities

Page

Brian Stelter, *Serving Up Television Without the TV Set*, N.Y. TIMES, Mar. 10, 2008, at C1 ... 10

Brian Stelter, *Web Site's Formula for Success: TV Content With Fewer Ads*, N.Y. TIMES, Oct. 29, 2008, at B10 10

Broadcast Music, Inc. ("BMI") and the American Society of Composers, Authors and Publishers ("ASCAP") submit this *amicus* brief in support of the Petition for a Writ of Certiorari, dated October 6, 2008 (the "Petition").[1]

INTEREST OF *AMICI CURIAE*

Amici curiae BMI and ASCAP are performing rights societies, expressly referred to as such in the Copyright Act, 17 U.S.C. § 101 (definition of "performing rights society"). ASCAP and BMI represent hundreds of thousands of songwriters, composers, and publishers of copyrighted music. They issue licenses to music users for the public performance of their members' and affiliates' musical works, collect license fees from the music users, and distribute those fees as royalties to their members and affiliates whose works have been performed on media such as television, radio, and the Internet. BMI and ASCAP each license the right of public performance in millions of musical works. Their affiliates and members, taken together, comprise almost all American songwriters, composers, lyricists, and music publishers. Through affiliation with foreign performing rights societies, ASCAP and BMI also

---

1. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least ten days prior to the due date of the *amici curiae's* intention to file this brief.

represent, in the United States, virtually all of the rest of the world's writers and publishers of music.

BMI's and ASCAP's licensing activities are governed by Consent Decrees that were entered into and are administered by the United States Department of Justice (the "Consent Decrees").[2] The Consent Decrees provide, among other things, that music users receive blanket licenses upon request, with rates and terms set by the United States District Court for the Southern District of New York in the absence of agreement.

ASCAP and BMI licensees include thousands of local television and radio stations, virtually all broadcast and cable/satellite television networks, on-demand programming packagers, cable system operators and direct broadcast satellite services, Internet service providers, thousands of websites, and tens of thousands of restaurants, night clubs, universities and colleges, hotels, concert promoters, sports arenas, and other businesses throughout the United States that perform music publicly. BMI's and ASCAP's repertoire-wide blanket licenses provide music users with efficient access to public performing rights for the quantity and variety of music the public demands. The crucial role of ASCAP and BMI in giving practical effect to the performing

---

2. BMI's current Consent Decree was entered in 1966, and amended in 1994. *United States v. Broad. Music, Inc.*, 1966 Trade Cases (CCH) ¶ 71,941 (S.D.N.Y. 1966), *amended by* 1996-1 Trade Cases (CCH) ¶ 71,378 (S.D.N.Y. 1994). ASCAP's governing Consent Decree is the Second Amended Final Judgment, entered June 11, 2001 in *United States v. American Society of Composers, Authors & Publishers*, 2001-2 Trade Cases (CCH) ¶ 73,474 (S.D.N.Y. 2001).

rights granted by Congress to the creators of music in section 106(4) of the Copyright Act is described in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979).

Importantly, performing rights royalties constitute the largest single source of income for many composers, lyricists, songwriters, and music publishers. Most of these royalties come from broadcast and cable television and radio, and an increasing share comes from the Internet. In total, BMI and ASCAP together collect nearly two billion dollars in royalties per year. The Second Circuit's decision places a substantial part of this livelihood in serious jeopardy. By its erroneous narrowing of the exclusive right to make performances "to the public" granted to songwriters by Congress, the Second Circuit has provided a roadmap for companies to avoid paying for many of their transmissions of music to their customers. Not only could the decision destabilize longstanding markets that currently provide income to songwriters, it also threatens income derived from rapidly evolving Internet-based and other on-demand markets. The right of public performance at issue in this matter is of vital concern to the music creators whom BMI and ASCAP represent.

SUMMARY OF ARGUMENT

As performing rights societies, ASCAP and BMI "license[ ] the public performance of nondramatic musical works on behalf of copyright owners." 17 U.S.C. § 101. If the Second Circuit's erroneous interpretation of the public performing right stands, this task could become exponentially more difficult, especially in valuable emerging markets for digital and on-demand music. The Second Circuit's interpretation posits that a service can create copies of works at the request of its customers and then utilize those copies to transmit performances of those works to the customers on-demand without engaging in a public performance under 17 U.S.C. § 106(4). This narrow and unprecedented view of one of the broadest and most fundamental exclusive rights granted by Congress to songwriters and composers creates the opportunity for businesses to provide performances of copyrighted music to their customers, for a fee, without paying royalties to those who created it. The loophole created by the ruling is therefore particularly detrimental to *amici's* affiliates and members, whose livelihoods often depend on public performance royalties.

Moreover, should the decision stand, BMI and ASCAP, and their affiliates and members, could suffer unique harm because disputes regarding ASCAP's and BMI's public performance licenses, pursuant to the Consent Decrees, proceed before rate courts set in the United States District Court for the Southern District of New York. This outsized potential impact of the decision below on the hundreds of thousands of composers, songwriters, and music publishers represented by *amici* weighs strongly in favor of review.

Finally, the Second Circuit's decision contains clear errors in its interpretation of the Copyright Act. The unauthorized conduct that the Court's decision encourages is proscribed by the plain language of the Copyright Act. The exclusive right of public performance, unlike other rights such as reproduction or distribution, bears no relation to the presence, number, or source of copies used. The text and legislative history of the statute specifically describe a broad right to publicly perform music, regardless of the technology employed to do so. Indeed, the decision below conflicts with the rulings of other circuits, and raises serious questions about United States compliance with international treaty obligations.

In view of the foregoing, this Court should grant the Petition to correct the errors made below.

ARGUMENT

I. ALLOWING THE SECOND CIRCUIT DECISION TO STAND WILL CAUSE IMMEDIATE AND SUBSTANTIAL HARM TO SONGWRITERS AND COMPOSERS.

A. The Second Circuit Decision Creates a Loophole That Allows Music Users to Avoid Paying Public Performance License Royalties.

If allowed to stand, the Second Circuit's decision creates a loophole in the copyright law through which all sorts of commercial media companies could seek to avoid paying public performance license fees. Cablevision's remote-storage digital video recorder ("RS-DVR") system allows all subscribing households—potentially millions of viewers—the option (for a fee) to view televised programs at a time of their choosing, without the permission of the copyright owners, whether or not they have viewed the program when it was initially shown.[3] *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 124-25 (2d Cir. 2008). Whenever customers select a particular program for potential later viewing, additional copies of the original program are made by the RS-DVR system. The customers then notify Cablevision when they wish to view the program, and the pre-recorded copies of the program

---

3. As of December 31, 2007, Cablevision had approximately 3.1 million basic video subscribers in and around the New York City metropolitan area. Cablevision Systems Corp., Annual Report (Form 10-K), at 1 (Feb. 28, 2008).

are then transmitted to the subscribers by Cablevision. Based on engineering choices made by Cablevision in designing the system, the Second Circuit held that, "[b]ecause each RS-DVR playback transmission is made to a single subscriber using a single unique copy produced by that subscriber, we conclude that such transmissions are not performances 'to the public,' and therefore do not infringe any exclusive right of public performance." *Id.* at 139.

So, for example, an episode of the AMC cable network program *Mad Men* might be transmitted by Cablevision on a given Sunday night at 10 p.m., in its scheduled time slot. If just 1% of Cablevision's subscribers—approximately 30,000 households—elect to use the RS-DVR system to watch the episode at a later time, 30,000 households receive transmissions from Cablevision of that episode that they watch at those later times as the program arrives by cable at their home televisions. According to the Second Circuit, these are 30,000 "private" performances of the same exact episode, all transmitted from Cablevision's central "head-end" by cable to its subscribers' households. And of course, Cablevision can charge its subscribers for the privilege of watching these supposedly "private" performances.

Even if the Second Circuit's "private" performance ruling requires the viewer or listener to "do" the copying to take advantage of the loophole, companies can easily structure their technology so that customers "do" the copying.[4] Under the decision, all that is necessary for the

4. The Second Circuit's ruling expressly does not reach *who*—as between Cablevision and its subscriber—"performs" the copyrighted work when the RS-DVR is employed, resting instead on the conclusion that no public performance occurs. (Cont'd)

home subscriber to "do" the copying is a simple press of a button on the remote control, setting in motion the copying machinery engineered, owned, and maintained by the company on its premises. *Id.* at 131-33. This massive copying can be accomplished at little cost using digital technology. Companies are therefore apparently free to (1) simply structure their technology so that a copy is made remotely each time a viewer or listener electronically requests any kind of program before transmission, and (2) then not pay for the music used in those television programs.

Moreover, some may read the Second Circuit's ruling more broadly to label as "private" *any* transmission of a unique copy of a work to a single user. Under this construction, companies simply need to structure their systems to transmit unique exact copies of each program (or song) for each of their viewers or listeners—an easy and inexpensive endeavor in the current digital age—in order to attempt to avoid paying performance royalties, thereby greatly harming ASCAP's and BMI's members and affiliates.

(Cont'd)

Cartoon Network, 536 F.3d at 134. Paradoxically, however, the Second Circuit appears to hold that who "does" the *copying* matters to whether the *performance* is "to the public," ruling that "[b]ecause each RS-DVR playback transmission is made to a single subscriber using a single unique copy *produced by that subscriber*, we conclude that such transmissions are not performances 'to the public' . . . ." *Id.* at 139 (emphasis added). As discussed in part II(A) *infra*, this is a fundamental flaw in the court's reasoning. The reproduction right and the public performing right are separate and distinct rights, and the number or source of copies—if any—used to generate a transmission is irrelevant to the public performing right.

B. The Second Circuit Decision Threatens to Deprive Songwriters of Royalties for a Broad Range of Digital and On-Demand Services.

This case arises in the context of the delivery of broadcast and cable network television programs and films by a cable system operator to home viewers, an arena where BMI and ASCAP are actively engaged in collecting public performance royalties.[5] After the advent of digital broadcasting, ASCAP and BMI have offered licenses that include—for a fee—the right to make digital transmissions (including on-demand transmissions) of the music in scheduled programming, on dedicated high definition television channels, stations' websites, network-owned websites, and on various third party websites.

Increasing amounts of revenue are derived from *amici's* licenses to Internet sites and services for the digital transmission of music to the public. With improved technology, the digital transmission of music has become faster and more commonplace, increasingly replacing traditional analog broadcast modes of content delivery and sales of physical copies. There has been "a sharp shift in entertainment viewing that was thought

---

5. *Amici* license cable and broadcast networks for their full schedule of programming, with the licenses covering transmissions "through to the viewer"—that is, both the satellite transmissions from the cable network to the cable systems' head-ends, and the near-simultaneous transmissions by cable systems such as Cablevision to subscribers. *Amici* also separately license the cable system operators for non-network programming that the operators originate, such as local news or public access programs.

to be years away: watching television episodes on a computer screen is now a common activity for millions of consumers." Brian Stelter, *Serving Up Television Without the TV Set*, N.Y. TIMES, Mar. 10, 2008, at C1. Already there are times when more viewers may see a network-originated program via on-demand transmissions from an authorized website than on the broadcast network itself. For example, some recent *Saturday Night Live* political sketches were viewed more times online than on the NBC television broadcasts. Brian Stelter, *Web Site's Formula for Success: TV Content With Fewer Ads*, N.Y. TIMES, Oct. 29, 2008, at B10.

The popularity of on-demand services continues to grow. The day when everyone watched or listened to the same program at the same time—scheduled television and radio—is fading. Traditional "linear" radio and television programming is increasingly being replaced, especially for young people, with on-demand entertainment that never appears in a scheduled time slot. These are point-to-point electronic transmissions from a cable system, an Internet site, or a mobile entertainment provider via a cell phone or other wireless device to the individual customer. For example, millions of customers now access streamed performances of audiovisual works (including music videos) and music on-demand from their computers and mobile entertainment devices through a variety of services such as Rhapsody, LaLa, and Napster, generating steadily growing revenues through licensed use of copyrighted content. Cablevision already participates in this dramatic shift. At the end of 2007, Cablevision had 2.6 million subscribers to iO TV, its digital video service that includes "access to hundreds of titles each month on

demand, featuring hundreds of movies, and subscription video on demand programming . . . ." Cablevision Systems Corp., Annual Report (Form 10-K), at 4 (Feb. 28, 2008). As of now, *amici* license on-demand services, which in turn provide on-demand programming to cable system operators. The Second Circuit decision has placed those fees in jeopardy.

These digital and on-demand markets provide a significant source of revenue for American songwriters, composers, and music publishers. The Second Circuit decision creates an easily exploited loophole that threatens this revenue, on which so many music creators depend, and it therefore warrants review by this Court.

C. Because of the Rate Court System Which Governs ASCAP and BMI, Music Creators May Be Particularly Harmed by the Decision Below.

BMI and ASCAP, and the music composers for whom they administer the public performing right, risk being uniquely harmed if the decision below stands. The Second Circuit's constriction of the public performing right will have repercussions in a broad range of licensing negotiations. In the case of BMI and ASCAP, these negotiations are not purely private, but concern rates that are ultimately subject to supervision by the rate courts—located in the Southern District of New York.[6] A provider that rigs its service to follow the route mapped by Cablevision around the perimeter of the public performing right, and then rejects the scope and

6. *See supra* note 2 and accompanying text.

terms of the licenses offered by ASCAP and BMI, always has the option of bringing its case before the rate courts, both of which are located within the Second Circuit. Under the Consent Decrees, the rate courts determine whether a particular use of music involves the exercise of the public performing right. If the answer is negative, the use may be categorically excluded from the calculus in determining the court-ordered license rate for a service that includes that use. *See, e.g., United States v. Am. Soc'y of Composers, Authors & Publishers (In re America Online Inc., RealNetworks Inc. & Yahoo! Inc.)*, 562 F. Supp. 2d 413, 494 (S.D.N.Y. 2008) (analyzing whether portion of RealNetworks' service required licenses).

Thus, for *amici*, the decision below is not simply an erroneous statutory interpretation by one of thirteen Courts of Appeals. For the public performing right in music, the Second Circuit, in practice, assumes a status of first among equals because it is the only court to which appeals from decisions of the rate courts may be brought. Its precedents not only govern the adjudication of routine infringement cases that arise within its geographic jurisdiction; they also potentially control the resolution of every dispute, no matter where it arises, involving the ASCAP and BMI licenses pertaining to the public performing right in the millions of compositions administered by BMI and ASCAP. *Amici* submit that these unique circumstances counsel strongly for the grant of the Petition.

II. THE SECOND CIRCUIT DECISION IS CLEARLY INCONSISTENT WITH THE BROAD EXCLUSIVE RIGHT OF PUBLIC PERFORMANCE DESCRIBED IN THE TEXT AND THE LEGISLATIVE HISTORY OF THE COPYRIGHT ACT.

In the 1976 Copyright Act, Congress granted copyright owners a broad public performing right. Its goal was to enable creators—including music composers—to exploit their works by any technological means then existing or later developed. Congress recognized that it could not predict what forms the new means of dissemination would take, and thus encompassed all of them within the scope of the public performing right. The decision below would confine this intentionally broad right within a technological straitjacket and tether its applicability to the number of copies associated with the transmissions in question, a factor that has heretofore been completely irrelevant to the scope of the right. Granting the Petition would enable this Court to examine the contours of the public performing right for the first time since enactment of the 1976 Act, to correct the misreading of the statute by the court below, and to ensure that the interests of music creators are not left behind in the headlong rush of new technologies for disseminating musical works to the public.

A. The Second Circuit Misinterpreted the Statute.

The Copyright Act grants the owner of a copyright an exclusive right "to perform the copyrighted work publicly." 17 U.S.C. § 106(4). The definitions of the key terms "perform" and "publicly" are expansive and must be given full force because Congress intended to "set forth the copyright owner's exclusive rights in *broad* terms." H.R. REP. NO. 94-1476, at 61 (1976) (emphasis added); S. REP. NO. 94-473, at 57 (1975) (same). Instead of doing so, the court below myopically scrutinized a few words in the definition of "publicly," and consequently reached a result wholly inconsistent with the stated intent of Congress and the plain language Congress employed to carry out that intent.

In deciding whether Cablevision's RS-DVR service implicated the public performing right, the court below correctly focused on the "transmit clause"—the second prong of the definition set forth in 17 U.S.C. § 101:

> To perform or display a work "publicly" means—
>
> . . . .
>
> (2) to transmit or otherwise communicate a performance or display of the work . . . to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

Virtually every phrase of this definition evinces an intent to encompass on-demand services like those

provided by Cablevision.[7] All Cablevision subscribers are "capable of receiving the performance" of a particular audiovisual work by ordering it through the RS-DVR service. Each of these subscribers would receive the performance in their own individual homes, and at different times. The statute is explicit that neither of these latter facts takes Cablevision's system outside the scope of the exclusive public performing right. Moreover, the statute's insistence that a transmission "by means of any device or process" is a public performance further signals that the specific technological means employed by Cablevision are irrelevant to whether its conduct requires authorization from the copyright owners.[8] As this Court concluded in

---

7. Indeed, a prescient House report almost seemed to be describing the RS-DVR system when it stated that the public performing right applied whenever a transmission is "capable of reaching different recipients at different times, as in the case of sound or images stored in an information system and capable of being performed or displayed at the initiative of individual members of the public." H.R. REP. No. 90-83, at 29 (1967). Although the Second Circuit "question[ed] how much deference this report deserves," because it was written nearly ten years before enactment of the 1976 Copyright Act (*Cartoon Network*, 536 F.3d at 135), the statutory language that the report explains was virtually identical to the language that ultimately became law. *See* William F. Patry, 4 PATRY ON COPYRIGHT § 14:16 (2008) ("With the exception of a minor amendment to the definition of 'to perform a work publicly' in 1974, the 1966 House Judiciary Committee bill's language on Section 106(4) and the relevant definitions in Section 101 were adopted in the 1976 Act.").

8. The same phrase recurs in the statutory definition of "perform." "To 'perform' a work means to recite, render, play, dance, or act it, either directly or by means of *any device or process* . . . ." 17 U.S.C. § 101 (emphasis added). This is further evidence that Congress intended the public performing right to encompass myriad technologies of delivery and receipt.

Buck v. Jewell-La Salle Realty Co., 283 U.S. 191, 198 (1931), in determining that dissemination of music to individual hotel guest rooms was a public performance, "the novelty of the means used does not lessen the duty of the courts to give full protection to the monopoly of public performance . . . which Congress has secured to the composer."

Instead of heeding this Court's instruction on that point, the court below zeroed in on the phrase "capable of receiving the performance." Although acknowledging that "the statute says 'capable of receiving the performance,' instead of 'capable of receiving the transmission'" (*Cartoon Network*, 536 F.3d at 134), the court below proceeded to direct all its attention to what the statute does not say, while ignoring what it does say. The opinion below phrases the operative question as "who precisely is 'capable of receiving' a particular *transmission* of a performance." *Id.* at 135 (emphasis added). Even if the transmissions made by Cablevision—like any point-to-point transmission—are "capable" of being received by only one party, that is not the question the statute asks. The lower court's tunnel vision allowed it to ignore the fact that thousands of other Cablevision subscribers, using the same service, were "capable of receiving the [same] performance,"—that is, the same program episode as originally acted, played, and recorded—albeit at different times and in different places.[9]

9. Interactive one-to-one transmissions are and have been treated as public performances since they were first developed. In 1995, at the dawn of the development of digital music services, Congress confirmed this interpretation by including a definition of "interactive service" in section 114 of the Copyright Act (providing a full exclusive right to sound recording producers). 17 U.S.C. § 114.

In this way, the decision below conflicts with *Columbia Pictures Industries, Inc. v. Redd Horne, Inc.*, 749 F.2d 154, 159 (3d Cir. 1985) (one-to-one transmissions of video signals to private viewing booths were public performances). The Northern District of California similarly concluded that public performing rights were infringed by a hotel-operated computer which allowed guests to select movies from the hotel's collection for viewing in their rooms, at a time of the guests' choosing, via videocassette players maintained by the hotel in a centrally located equipment room. *On Command Video Corp. v. Columbia Pictures Indus.*, 777 F. Supp. 787, 790 (N.D. Cal. 1991). Such services are not legally distinguishable from Cablevision's transmissions to individual subscribers via the RS-DVR system.

The lower court sought to buttress its conclusion that the RS-DVR service involved no public performances by observing that it "only makes transmissions to one subscriber using a copy made by that subscriber." *Cartoon Network*, 536 F.3d at 137. But whether many, one, or no copies are used to generate the transmission is irrelevant to whether a public performance occurs. The Court of Appeals was simply wrong when it stated that "no transmission of an audiovisual work can be made, we assume, without using a copy of that work." *Id.* Indeed, the dominant forms of public performance under the transmit clause at the time the 1976 Act was drafted and enacted—broadcast television and radio—use no copies at all when a live performance of a song, opera, play, or other work is broadcast. The public performing right—first codified in 1897—has always applied to such broadcast transmissions, whether or not a copy was used to

generate them. *See, e.g., Jerome H. Remick & Co. v. Gen. Elec. Co.*, 16 F.2d 829 (S.D.N.Y. 1926) (broadcast of live performance).

The lower court's reading of the transmit clause is simply impossible to reconcile with the statute and legislative history. The public performing right has nothing to do with the making of copies. Neither section 106(4), which establishes the public performing right, nor any of the accompanying definitional provisions in section 101 (including the transmit clause) makes any reference to copies, unlike the corresponding provisions establishing the reproduction and distribution rights. 17 U.S.C. §§ 106(1) and (3).

That the Second Circuit misread the statute is further shown by the Copyright Act's legislative history, which clearly expresses the intent to create a broad, technology-neutral public performing right:

> [T]he definition of "publicly" in section 101 makes clear that the concept[] of public performance . . . include[s] . . . acts that transmit or otherwise communicate a performance . . . of the work to the public by means of *any* device or process. The definition of "transmit" . . . is broad enough to include *all conceivable forms and combinations* of wired or wireless communications media, including *but by no means limited to* radio and television broadcasting as we know them. *Each and every* method by which the images or sounds comprising a performance . . . are picked up and conveyed is a "transmission,"

> and if the transmission reaches the public *in [any] [sic] form*, that case comes within the scope of [the public performing right].

H.R. REP. No. 94-1476, at 64 (1976) (emphasis added); S. REP. No. 94-473, at 61 (1975) (same). Surely Cablevision's RS-DVR service qualifies as a "conceivable form [or] combination[] of wired or wireless communications media," as well as a "method by which images or sounds comprising a performance . . . are picked up and conveyed." The Second Circuit's reading can be validated only if the phrase "*any* device or process" excludes a device or process that makes multiple copies of the initial performance, and then redelivers identical transmissions of the same performance, one at a time, on the command of the individual subscribers, into their homes. This conclusion contravenes the clearly expressed legislative intent of the 1976 Act, and invents an exception—for services that create copies of transmitted works—that has no basis in the law. Such a thoroughgoing misreading of the law deserves review and correction by this Court.

B. The Second Circuit Disclaimer Provides No Comfort to Composers of Music and Interferes with Congress' Intent to Make Exclusive Rights Divisible.

Almost as an admission of the convoluted reasoning underlying its interpretation of the public performing right, the Second Circuit stated that "[t]his holding, we must emphasize, does not generally permit content delivery networks to avoid all copyright liability by making copies of each item of content and associating

one unique copy with each subscriber to the network, or by giving their subscribers the capacity to make their own individual copies." *Cartoon Network*, 536 F.3d at 139-40. This qualification of the opinion's misguided approach to public performances relies mostly on the potential applicability—although evidently not under the facts of this case—of the reproduction right. This provides little comfort to composers, whose livelihood is much more dependent on public performance royalties (predominantly those collected by *amici*) than on reproductions or distributions.

Moreover, this disclaimer ignores the fact that Congress intended to provide copyright owners with a "bundle of rights" that "may be subdivided indefinitely . . . and each subdivision of an exclusive right may be owned and enforced separately." H.R. REP. No. 94-1476, at 61 (1976); S. REP. No. 94-473, at 57 (1975); *see also* 17 U.S.C. § 201(d)(2). The decision below seeks to salve the wound it inflicts on the public performing right by noting that "the owner of a copyright . . . may be able to seek redress . . . for the underlying copying that facilitated the transmission," even if the transmission itself is defined out of the scope of the public performing right. *Cartoon Network*, 536 F.3d at 138. This overlooks the inconvenient fact that the owners of these two rights may be entirely different parties. Thus, there is no basis for assuming that the creator will be compensated on the swings for what she loses on the roundabouts. *See Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 960 (2005) (Breyer, J., concurring).

In effect, the decision below tells the hundreds of thousands of BMI affiliates and ASCAP members that,

in the case of cleverly designed services for on-demand dissemination of their musical works, they must forgo both the revenues associated with the public performing right and the well-established efficiencies of collective administration of public performance royalties, and instead rely solely upon a more fragmented and disjointed strategy of attempting to license service providers for the exercise of the reproduction right.[10] This Court should grant certiorari to ensure that this scenario does not occur.

C. The Second Circuit Decision is Inconsistent with International Copyright Treaties to Which the United States is a Member.

The United States is obligated by international copyright treaties to provide a broad public performing right in its copyright law. The treaty obligations encompass public performances (also known as "communications to the public") regardless of the means of transmission of the performance, whether the transmission emanates from a single or multiple copies, or whether it is to multiple or individual recipients.

Compliance with these treaty obligations—under the Berne Convention ("Berne"),[11] the World Trade

---

10. In addition, it ignores the reality of licensing music for certain works, such as the incorporation of music into television programs and films, which typically involves transfers of the composer's reproduction right without any means of continuing royalty remuneration absent a public performance royalty.

11. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, (Paris Text 1971, as amended Sept. 28, 1979), 828 U.N.T.S. 221.

Organization Agreement on Trade-Related Aspects of Intellectual Property Rights ("WTO/TRIPs"),[12] and the World Intellectual Property Organization Copyright Treaty ("WCT")[13]—ensures the reciprocal payment of royalties for the use of the works of American songwriters abroad, and for the use the works of foreign rightholders in the United States under the principle of "national treatment."

Article 11 of Berne states that "[a]uthors of dramatic, dramatico-musical and musical works shall enjoy the exclusive right of authorizing: (i) the public performance of their works, including such public performances by any means or process; [and] (ii) any communication to the public of the performance of their works."[14] As the official guide to the Berne Convention notes, this provision applies "by any means or process" which covers live direct performances and it "covers performances by means of recordings." Claude Masouye, *Guide to the Berne Convention for the Protection of Literary and Artistic Works* par. 11.4 (WIPO Publication 1978).

The requirements of the Berne Convention in Article 11 are incorporated into WTO/TRIPS (Art. 9, incorporating Berne Arts. 1-21) and the WCT (Art. 1, incorporating Berne Arts. 1-21). The WCT goes even

---

12. Agreement on Trade-Related Aspects of Intellectual Property Rights, April 15, 1994, 33 I.L.M. 81.

13. WIPO Copyright Treaty, Dec. 20, 1996, 36 I.L.M. 65.

14. Article 14*bis* of Berne provides similar rights for owners of copyrights in cinematographic works.

further, obligating the United States to recognize, as part of the exclusive right of communication to the public, the rightholder's control over "the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them." WCT, Art. 8. Thus, Berne, the WTO, and WCT all require United States law to afford to creators a broad, technology-neutral exclusive right that embraces services of the type undertaken by Cablevision. While none of these treaties is self-executing in United States law, United States accession to each of them was based on a determination by the President, ratified by the Senate, that American law was compliant with the treaty obligations. These determinations followed the enactment of implementing legislation to bring American law up to the standard of each treaty.[15] None of these enactments required any amendment to the statutory provisions establishing the public performing right. *See generally* Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998); Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994); Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988).

The Second Circuit decision in this case—especially as it applies beyond the RS-DVR context—will raise serious questions regarding United States compliance

---

15. This Court has previously observed that even before the United States acceded to Berne in 1989, the 1976 Copyright Act brought United States law into compliance with Berne standards in some respects. *See Eldred v. Ashcroft*, 537 U.S. 186, 195 (2003) (1976 Act aligned United States law with Berne with respect to term of copyright protection).

with its treaty obligations. ASCAP and BMI depend on reciprocal agreements with their foreign counterparts to collect royalties for public performance in overseas jurisdictions for the works of American composers. To the extent that BMI and ASCAP can no longer collect, on behalf of foreign composers, public performance royalties for on-demand services like the one involved in this case, these agreements with performing rights societies in foreign jurisdictions will be undermined. Such a scenario would compound the detrimental impact of the decision below on hundreds of thousands of American music creators.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

STEVEN J. METALITZ
ERIC J. SCHWARTZ
J. MATTHEW WILLIAMS
MITCHELL SILBERBERG
& KNUPP LLP
1818 N Street, N.W.,
8th Floor
Washington, D.C. 20036
(202) 355-7900

JOAN M. MCGIVERN
RICHARD H. REIMER
SAMUEL MOSENKIS
CHRISTINE A. PEPE
ASCAP Building
One Lincoln Plaza
New York, NY 10023
(212) 621-6200

Counsel for Amicus Curiae American Society of Composers, Authors & Publishers

MICHAEL E. SALZMAN
Counsel of Record
JESSICA A. FELDMAN
HUGHES HUBBARD & REED LLP
One Battery Park Plaza
New York, NY 10004
(212) 837-6000

MARVIN L. BERENSON
JOSEPH J. DIMONA
320 West 57th Street
New York, NY 10019
(212) 586-2000

Counsel for Amicus Curiae Broadcast Music, Inc.